

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 68

Docket No. CH-3443-09-0829-I-1

**Melissa L. Burnett,
Appellant,**

v.

**Department of Housing and Urban Development,
Agency.**

April 20, 2010

Melissa L. Burnett, Madison, Illinois, pro se.

Lawrence J. Park, Esquire, Kansas City, Kansas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review (PFR) of the initial decision (ID) that dismissed her appeal for lack of jurisdiction. We GRANT the appellant's PFR and AFFIRM the ID as MODIFIED, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a former agency employee, filed an appeal in which she argued that the agency had failed to award her proper tenure (based on her prior service with the Department of the Army) and made mistakes in her performance

appraisal which caused her to be denied certain awards. She argued that the agency committed various prohibited personnel practices, including obstructing her right to compete, giving others unauthorized preference or improper advantage, violating laws, rules, and regulations implementing or directly concerning the merit principles, and discriminating against her based on her race and sex. The appellant argued that all of these practices prevented her from advancing during her employment and from being selected for other positions after she was terminated. Initial Appeal file (IAF), Tab 1 at 1-11. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant had not shown that any of the matters about which she complained were appealable to the Board. ID at 2-3. In her PFR, and in subsequent submissions, the appellant argues that the Board does have jurisdiction to hear her appeal. PFR File, Tab 1 at 2, 7-8, 14.

ANALYSIS

¶3 The appellant has not presented significant new evidence that was unavailable for consideration earlier, and has not shown error in the administrative judge's finding that the Board lacks jurisdiction over the matters listed above.¹ However, the appellant argues in her PFR that she raised below an

¹ When the agency failed to timely respond to her PFR, the appellant filed a motion for a default judgment. PFR File, Tab 4. The agency acknowledged that it had received the appellant's PFR but explained that it did not receive the Board's acknowledgment of it and so did not know the date by which it had to respond. *Id.*, Tab 5. The agency challenged the appellant's motion for a default judgment and urged that her PFR be denied. *Id.* The parties filed subsequent pleadings on this matter. *Id.*, Tabs 6-7, 9-13. We deny the appellant's motion because the Board lacks authority to issue such a judgment against an agency. *Hayes v. Department of the Treasury*, [74 M.S.P.R. 613](#), 615 (1997). Moreover, in light of our disposition to affirm the ID, still dismissing the appeal for lack of jurisdiction, we need not, and do not, determine whether the agency's response to the appellant's PFR was timely filed. We also find that the appellant's March 17, 2010 submission does not provide a basis for granting review because the new evidence in that submission lacks sufficient weight to warrant a different outcome. PFR File, Tab 14; *see Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

issue concerning the propriety of her termination from the agency in 2008. PFR File, Tab 1 at 4. We find that the appellant did indeed raise that issue below, IAF, Tab 1 at 9, and, because the administrative judge failed to address it, we do so now.

¶4 The record reflects that on June 13, 2006, the appellant, a non-preference eligible, accepted a temporary excepted service position with the agency as a GS-7 Program Assistant. Her appointment, which was not to exceed September 30, 2006, was under the Student Temporary Employment Program (STEP) pursuant to [5 C.F.R. § 213.3202](#)(a). IAF, Tab 1 at 143. Such appointments are not to exceed 1 year and may be extended in 1-year increments. 5 C.F.R. § 213.3202(a)(10)(i).

¶5 The agency extended the appellant's original appointment, effective October 1, 2006, IAF, Tab 1 at 29, and on September 30, 2007, it extended the appointment again, this time indicating that it was not to exceed September 28, 2008, *id.*, at 149. On March 7, 2008, however, the agency terminated the appellant's appointment because she was no longer enrolled as a student. *Id.* at 151, 66; *id.*, Tab 3 at 13. The appellant argued below that the agency should not have terminated her as it did because she did not actually graduate until 3 months after the termination date. IAF, Tab 1 at 9.

¶6 An individual who is involuntarily separated for cause is entitled to appeal to the Board under [5 U.S.C. §§ 7512](#)(1), 7513(d), only if the person meets the definition of "employee" under [5 U.S.C. § 7511](#)(a)(1). *Johnson v. Department of Veterans Affairs*, [99 M.S.P.R. 362](#), ¶ 4, *review dismissed*, 161 F. App'x 945 (Fed. Cir. 2005); *Baker v. Department of Homeland Security*, [99 M.S.P.R. 92](#), ¶ 4 (2005). As a non-preference eligible in the excepted service, the appellant had to satisfy the definition of "employee" under 5 U.S.C. § 7511(a)(1)(C), which provides that an "employee" means:

(C) an individual in the excepted service (other than a preference eligible) –

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.

The appellant only need satisfy the requirements under (C)(i) or (C)(ii) in order to be an employee with adverse action appeal rights; she need not satisfy both sets of requirements. *See Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#), 1151 (Fed. Cir. 1999).

¶7 We first address whether the appellant satisfies the definition of “employee” under [5 U.S.C. § 7511](#)(a)(1)(C)(i). As noted above, the agency appointed her to her position under the STEP Program. Such appointments are not eligible for non-competitive conversion to career or career-conditional appointments, [5 C.F.R. § 213.3202](#)(a)(10)(iii), and may only be converted to Student Career Experience Program appointments, which are themselves in the excepted service. [5 C.F.R. § 213.3202](#)(a)(10)(iii), (15). Therefore, the appellant was not serving under an initial appointment pending conversion to the competitive service and is not an “employee” under § 7511(a)(1)(C)(i). *See Forest v. Merit Systems Protection Board*, [47 F.3d 409](#), 412 (Fed. Cir. 1995); *see also Johnson*, [99 M.S.P.R. 362](#), ¶¶ 8-9.

¶8 We next address whether the appellant satisfies the definition of “employee” under [5 U.S.C. § 7511](#)(a)(1)(C)(ii). Her initial appointment was effective June 13, 2006, IAF, Tab 1 at 143, and the agency terminated her effective March 7, 2008, less than 2 years later.² *Id.* at 151. Therefore, she

² Although the appellant states that she served in the STEP position until March 7, 2009, PFR File, Tab 1 at 7, her reference to the year 2009 appears to be inadvertent. The standard form 50 (SF-50) she submits on review shows a termination date of March 7, 2008. *Id.* at 14. Moreover, she indicated in her Appeal Form that she was terminated on March 7, 2008, IAF, Tab 1 (Appeal Form at 3, Block 4), and the other SF-50s in the record documenting her termination show that it was effective on March 7, 2008. *Id.*, Tab 1 at 151, 162.

lacked 2 years of current continuous service. Moreover, all of her appointments were temporary and limited to 2 years or less. *Id.* at 143, 29, 149. Nor does the appellant's service with the Department of the Army, which ended in 1994, render her an "employee" because "current continuous service" means service immediately prior to the action at issue without a break in service of a work day. *See McCrary v. Department of the Army*, [103 M.S.P.R. 266](#), ¶ 8 (2006). Therefore, the appellant is not an "employee" under § 7511(a)(1)(C)(ii).

¶9 The appellant's appeal of her termination is DISMISSED for lack of jurisdiction.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.